Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1999

LUCILE C. BARNETT - - - - - *Petitioner*

versus

DEPARTMENT OF VETERAN AFFAIRS - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

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November 25, 1998

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1/2 PP

QUESTIONS PRESENTED

1. Whether the decision in time re: reprisal is affected by fact that comments began immediately and escalated over time.

2. Whether departmental procedures were used to discriminate against only female in department.

3. Whether issues of workload and office procedure should be considered in evaluation of discrimination claims where only female in department has higher workload than males in department.

4. Whether the communication of a rule by a male to males but not to the only female employee and then to use that rule against the female employee constitutes unlawful sex discrimination.

PARTIES

The Parties herein:

Lucile Barnett ..... Plaintiff

Department of Veteran Affairs ..... Defendant

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OPINIONS BELOW

The judgment sought to be reviewed is that of the Sixth Circuit Court of Appeals in *Lucile Barnett v. Department of Veterans Affairs*, 1998 (Circuit Court Number 96-6145), entered August 28,1 998. (Appendix *infra* pp. 1a). The decision of the trial court is not officially reported.

JURISDICTION

This is a case arising under Title VII of the Civil Rights Act of the United States, 42 USC 2000(c) *et. seq.*, and the Age Discrimination in Employment Act 29 USC 633a.

The Notice of Appeal was filed August 20, 1996.

The jurisdiction of the Supreme Court to the United States is conferred by Rule 19 of the Supreme Court of the United States and 28 USC §2101.

STATEMENT OF THE CASE

A. Overview

Plaintiff, Lucile Barnett, Ph.D., was reassigned as a counseling psychologist (CP) in the Vocational Rehabilitation and Counseling (VR&C) Division of the United States Department of Veterans Affairs (DVA), under Mr. Leonard Mullins, beginning August 2, 1987. This reassignment followed previous Title VII litigation in which Barnett successfully alleged the DVA wrongfully reduced her rank from GS-12, rating specialist to GS-7 adjudicator.

The work of a counseling psychologist (CP) involved determining educational and vocational services needed for veterans with service connected (SC) disability to obtain suitable employment. Clients entitled to these services were classified as employment handicapped based on qualifying criteria of disability and factual historical date. Additional duties as an acting Vocational Rehabilitation Specialist (VRS) included services and supervision for veterans in training at local facilities.

Under an annual Performance Appraisal Plan (PAP) satisfactory performance permitted no more than 10 procedural, 6 Judgmental, and 3 substantive errors.[1]

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[1] These errors were defined by DVA under the Statistical Quality Review System. (DVA Circular 28-82-2), (Joint Ex. I, Exhibit B to MSPB, pg. 333 and DVA Exhibit to MSPB, Book III, 4d(2))

1. *Substantive Error:* A serious deviation from established guidelines which affects the improper, incorrect or timely denial or granting of a benefit when the correct action would have had the opposite result. The term "benefit" is not restricted to monetary consideration, but also includes any other entitlement right subject to disposition.
2. *Judgmental Deficiency*: An inadequate reasoning process leading to a decision or opinion which may be considered

(Continued next page)

Annual evaluations covered a period from April 1 of a given year to March 31 the following year. Barnett's work was evaluated as satisfactory in March, 1988, 1989 and 1990.

Barnett while in training under Mullins, filed an EEO complaint in 1988 concerning the commentary on her performance appraisal. In April and May of 1990, Barnett filed EEO complaints of disparate treatment and retaliation, and in November 1990 another complaint of retaliation.

Mullins' hostility toward Barnett, present from the beginning, increased in severity after the early 1990 EEO activity with public ridicule and frequent meetings in which Barnett was subjected to his too loud, demeaning, and insulting remarks along with intimidation. Barnett's work was scrutinized to an extent not characteristic of the work of her co-workers.

On March 11, 1991, Mullins gave Barnett a "Warning of Unacceptable Performance — Notice of Opportunity Period" letter. It stated Barnett had committed seven substantive errors during the appraisal year, four more than allowed under the PAP. The letter informed Barnett she would be given an opportunity period of 60 days to improve her performance, and specified Barnett could make no more than one substantive, two judgmental, and four procedural errors during the 60 day period.

(Continued from preceding page)

to be inappropriate based on the facts of record and applicable program guidelines. This definition also applies to deficiencies which are considered to be of greater significance than procedural or mechanical discrepancies.

3. *Procedural Discrepancy:* A deviation from established method or form which does not have actual or potential effect on entitlement rights.

Mullins reviewed 45 cases and alleged Barnett had made eight substantive, 13 judgmental, and 18 procedural errors.[2] Mullins sent Barnett a notice of removal along with an offer to respond to the proposed action. Barnett contested the removal in writing but her removal was approved by Mr. John Hagan, then Director of the Louisville, Kentucky office, based on some of her cases being sent to Central Office and Mullins's recommendation. Mr. Ray Hill, a younger male employee, replaced Barnett.[3]

Barnett continued her EEO activities, filing complaints of retaliation concerning alleged errors in her work in January, March, and July 1991 and in August, 1991 concerning an incorrect SF 50-B Notification of Personnel Action.

Barnett filed a complaint in federal district court on September 18, 1991, alleging the DVA engaged in age and gender based discriminatory employment practices in violation of the ADEA and Title VII of the Civil Rights Act of 1964. Specifically, Barnett contended that the DVA, through its agent Leonard Mullins, had treated her with discriminatory animus and retaliated against her because of her EEO complaint activities.

The district court conducted a bench trial and, in a Memorandum Opinion filed July 22, 1996, concluded Barnett had presented a prima facie case of age and gender discrimination but had failed to demonstrate the DVA acted in a pretextual manner under *St. Mary's Honor Center* v. *Hicks*, 509 U.S. 502 (1993).

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[2] The Agency later, at the MSPB hearing, indicated the alleged errors should have been reported as eight substantive, six judgmental and four procedural according to DVA's instructions for reporting exceptions to employees work under the SQC system.

[3] The precise age of Ray Hill does not appear in the record. Neither party disputed Barnett's claim that Mr. Hill was "around 40". Barnett was 67 years of age when terminated.

While the court recognized the subjectivity of the counseling process, the court concluded Barnett's discharge was not fabricated nor pretextual, based on "objective" performance criteria.

Barnett was found not to have established a prima facie case of retaliation because of EEO activities, as these EEO activities had no link to her discharge.

Barnett appealed to the Sixth Circuit Court of Appeals which affirmed the district court's findings.

ARGUMENT

A. Basic Statement of the Law

Using the most common test for discrimination, in order to prevail under Title VII, the Plaintiff must first establish a prima facie case of sex discrimination which requires that she prove that: (1) she is a member of a protected class; (2) an adverse employment decision was made against her; (3) she was otherwise qualified for the position from which the adverse decision arose; and (4) a person not of her protected class replaced her. See: *Ensley-Gaines v. Runyon*, 100 F.3d 1120, 1224 (6th Cir. 1996); *Cf. McDonnell Douglass Corp. V. Green*, 411 U.S. 792, 802 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 n.6 (1981). Once the prima facie elements have been established, the defendant must produce evidence that a legitimate non-discriminatory reason for its action. *McDonnell Douglas*, 411 U.S. at 802. The burden of persuasion then returns to the plaintiff to demonstrate. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. at 252-53 (1981); *Goosetree v. Tennessee*, 796 F.2d 854, 861-63 (6th Cir. 1986).

Under the ADEA, a plaintiff must demonstrate evidence of the following to make out a prima facie case of age discrimination: (1) that plaintiff was between 40 and 65 years old; (2) that she was qualified for the particular

position; (3) that she was subjected to adverse employment action; and (4) that she was replaced by a younger individual. See: *Waythal v. Tex-Tenn Corp.*, 112 F.3d 243, 246 (6th Cir. 1997); See Also: *O'Conner v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312 (1996); *Barnhart v. Pickrel, Schaeffer & Ebeling Co.*, 12 F.3d 1382, 1390 (6th Cir. 1993). Once a prima facie case has been established, the shifting burden framework of *McDonnell Douglas* as stated above may be applied to cases of age discrimination. See: *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1082 (6th Cir. 1994).

The McDonnell Douglas test is not a rigid test. Each case must be reviewed on its individual merits. See: *Beaven v. Commonwealth of Kentucky,* 783 F2d 672 (6th Cir. 1986); *Laungenson v. Anaconda Company,* 510 F2d 307 (6th Cir. 1975); *Wanger v. Gray Co.*, 872 F2d 142 (6th Cir. 1989); *Blackwell v. Sun Electric Corp.*, 696 F2d 1176 (6th Cir. 1983).

There is no question that a negative job action was taken against Barnett. She was terminated from her job. In fact, the courts below determined that Lucile Barnett had presented a prima facie case of sex and age discrimination.

Statements regarding age, sex, EEO activity etc. such as Mullins, "The old bitch," are probative of discrimination. See: *Asplundh Tree Expert Co.*, 836 F2d 1544 (10 Cir. 1988) and *Metroff v. Xomax Corp.*, 797 F2d 271 (6 Cir. 1986).

An individual may show that he or she is qualified for a job by demonstrating excessive workload, unreasonable demands, unachievable goals. See: *Dale v. Chicago Tribune Co.* , 797 F2d 458 (7Cir. 1986). The 100% review of Barnett's work, and the conditions regarding that review represent such a situation. This is particularly true in

view of the standards set out for the 100% review discussed herein.

In cases such as this case, where the employer has put on proof of what it claims to be a legitimate nondiscriminatory business reason for its conduct, the inquiry shifts from whether the Plaintiff established a prima facie case of unlawful discrimination, to whether she established by a preponderance of evidence that the challenged action was motivated by unlawful discrimination. See: *United States Postal Services Board of Governors v. Aikens,* 460 U.S. 711 (1983).

The action of the employer in the physical intimidation of Barnett, as well as the public ridicule of Barnett by Mullins' telling stories and jokes about her as well as the exclusion of Barnett from meetings and the refusal to make her "acting" VR&C officer eroded her credibility to others in the office. The employer did not sufficiently address these issues, which when compiled with other mistreatment of Barnett created a hostile work environment as described herein. The Court did not properly interpret the *St. Mary's Home Center* (*IBID*) case in relation to these incidents.

Plaintiff met her burden of proving different treatment and discriminatory motive and intent. Further, the court has tended to ignore the fact that pursuant to *St. Mary's Home Center* (*IBID*), the prima facie case of plaintiff may be alone sufficient to establish pretext. In this case, the long standing hostility and animosity of Mullins toward Barnett beginning prior to Barnett being assigned to work for Mullins could have its basis only in Mullins' knowledge of Barnett's EEO activity. Further, this relationship which began with animosity on the part of Mullins, saw Mullins' animosity increase after Barnett filed EEO charges in his department.

With regard to the reprisal complaint of Lucile Barnett, the courts below have ruled that the termination was separated by too much time from Lucile Barnett's assignment to work for Mullins pursuant to a court order in her prior EEO case. The court should, however, consider that the reprisal began even before Barnett entered Mullins' department and evidenced itself by way of Mullins' treatment of Barnett through her tenure in the department. Further, the reprisal toward Barnett escalated when Barnett filed EEO complaints against Mullins. In short, there was never a period of time during which the atmosphere in the department was not hostile to Lucile Barnett.

To establish her claim of reprisal, Barnett must prove by a preponderance of the evidence that: (1) that plaintiff engaged in an activity protected by Title VII; (2) that the exercise of her civil rights was known by the defendant; (3) that, thereafter, the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action. *Johnson v. U.S. Dep't of Health and Human Services*, 30 F.3d 45-7 (6th Cir. 1994); *Canitia v. Yellow Freight Systems, Inc.*, 903 F.2d 1064, 1066 (6th Cir. 1990) (per curiam). Once the plaintiff establishes a prima facie, the *McDonnell Douglas* standards may be applied. Thus, the defendant must articulate a legitimate nondiscriminatory reason for its adverse employment action. The plaintiff must then show that the alleged nondiscriminatory reason is pretextual.

B. Barnett Entered A Hostile Workplace Which Became Increasingly More Hostile With The Passage Of Time

Prior to Barnett's reassignment to the Vocational Rehabilitation and Counseling (VRC) department, she had filed three non-selection EEO complaints (1984, 1984, 1985) for three vacancies: two for CP and one for vocational re-

habilitation specialist (VRS). Mullins was the selecting official (Ct. Vol. III, page 37, line 19 — page 39, line 6)[4].

When Barnett was reassigned to VR&C in August 1987, she entered a pre-established hostile environment. Mr. Shrader testified Mullins stated, "I wouldn't hire that old bitch on a bet" (Ct. Vol. IV, page 61, line 12-13). Mr. Duncan testified Mullins referred to Barnett As "little old lady" (Joint Ex. I, MSPB, Vol. II, page 513, line 20 – line 6, page 521). Ms. Zachgo, psychology technician, testified Mullins made known to everyone in the department that he disliked Barnett and didn't want her in his section (Zachgo depo., Joint Ex. I, Ex. A to MSPB, #3, page 16, line 23 24; page 28, line 5-6). Mullins laughed and joked about Barnett with the other CPs (IBID, page 1-12, 17-18).

Mullins made public derogatory statements about Barnett during a videotaping of a gift tape for Tim Lombardi. Ms. Zachgo testified there were some remarks with laughing by Mullins and that he "used to make different cracks about her" (IBID, pages 20 and page 30, line -12). Mr. Duncan reported this same instance (Joint Ex. I, MSPB, Vol. II, page 514-515).

Mullins distanced himself from Barnett, interacting infrequently. (Ct. Vol. I, page 33, line 15 — 25). Barnett requested Mr. Hunsinger be replaced as her trainer because he was unstructured. Mullins became her trainer, reviewing her cases, beginning the latter part of February, 1988. Generally, Mullins returned the folders to Barnett with his notes and without discussion (Ct. Vol. I, p. 53). The isolation of Barnett gradually increased over time.

Mullins refused to go to a departmental Christmas party in 1989 because Barnett would be there (Zachgo depot,

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[4] Barnett had been employed as a counseling psychologist in VR&C from 1973 to 1978 under Dr. Tom Youngman with satisfactory performance ratings.

Joint Ex. I, Ex. A to MSPB, #3, page 18, line 16 — page 20).

Ms. Zachgo as psychology technician was in charge of scheduling veterans for counseling. Mullins instructed her certain initial counseling cases were not to be assigned to Barnett (Zachgo depo., Joint Ex.I, Ex. A to MSPB #3 page 27, line 5-19).

The differences herein demonstrate that Barnett was treated differently than were the male CP's and that the business reason provided by the agency was pretext. The animosity toward Barnett began even before she entered the department. The reprisal against her began almost immediately. Further, the agency has not provided a reason for its failure to communicate. The reprisal resulted in a lack of communication of unwritten departmental rules to Barnett. The facts of the prima facie case are coupled with the lack of communication and the continuous hostility of Mullins for Barnett demonstrate discrimination pursuant to *St. Mary's Home Center v. Hicks*, 509 U.S. 502, 1135, Ct. 2742, (1993).

C. Harassment and Retaliation Followed Settlement of the 1988 EEO Complaint And More EEO Activity[5]

Based on counts from records held by DVA on the number of initial counseling appointments for each CP and days spent outside the office, Barnett wrote a memorandum concerning disparate treatment in the assignment of work and duties. With knowledge of this memorandum, Mullins ordered Barnett to his office April 13, 1990 and for

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[5] Between April and December 1990, Barnett filed three complaints of discrimination, harassment and retaliation' (Joint Exhibit I, Combined Cases 90-767 and 90-821 and Case No. 91-319). An additional five complaints were filed after January, 1991, and were combined in Case No. 91-1329 (Appendix to circuit court, page 465-466).

one hour 30 minutes, Mullins vented his anger with insults and humiliation at a volume so loud that Mr. Cartledge, whose office was next to Mullins's, left his office and went to another division (Joint Ex; I, MSPB' Vol. II, page 333-384).

Mullins appeared very angry, flushed face, waving papers around, and using a very loud, demanding voice. He specifically mentioned the EEO complaint of 1988, the memorandum, using after work hours for travel. (Joint Ex. I, Case 90-821, A-4-2, page 3-5; Ct. Vol. I, page 61-64). The fact that Mullins specifically mentioned Barnett's EEO complaint is probative of retaliation.

The harassment, humiliation, and very loud Interactions continued in Mullins' office each time Barnett submitted work which required Mullins' signature. Ms. Cartledge stated he left his office 3.3 times per month to avoid hearing the confrontations. Ms. Heiskell could recall only one instance each of Mullins raising his voice to Messrs Combs and Hunsinger, and those were in the hallway, Barnett was being harassed. (Heiskell depo., Joint Ex. I, Ex. A to MSPB, #5, page 17, line 6 — page 19, line 20).

Ms. Heiskell whose desk was immediately outside Mullins's doorway, testified when Mullins raised his voice to Barnett, that she never heard Barnett scream at Mullins (Heiskell depo, Joint Ex. I, Ex. A to MSPB, #5, page 19, line 7-9, IBID, page 32, line 24 — page 33, line 1). Ms. Heiskell recalled several occasions when Mullins raised his voice to Barnett when he asked her to come to his office (IBID, page 17, line 6 — page 19, line 8).

Ms. Heiskell testified she never saw Barnett arguing with Mullins with a veteran present (IBID, page 35, line 19-21) in contradiction to Mullins's allegation. (Joint Ex. I, Case 90-821, B-4, page 29, line 34 — page 30, line 4).

Mullins was physically abusive of Barnett, at one point jerking a notepad from her hands.

Personnel Officer Schock testified Barnett was afraid of Mullins and that Mullins had stated he took the notepad from her (Joint Ex. I, MSPB, Vol. II, page 432, line 20 — page 433, Ct. Vol. VIII, page 29, line 12 — line 20, page 30). This is contrary to Mullins's testimony (Ct. Vol. VI, page 103, line 5 — line 17, page 105).

The next EEO complaint was filed November 20, 1990 for an October 16 Formal Counseling Letter which concerned Barnett's interaction with a veteran and staff members when travel expenses were denied veterans and the veteran was without funds to return home (Joint Ex. I, Case 91-319). Most of Mullins's fault-finding was shown by the DVA investigation to have no basis in fact (Appendix A to Plaintiff's Post-trial Brief, Contradictions #1, and Ct. Vol. II, page 111, line 10 — page 116, line 12). DVA offered full relief of this complaint.

Another EEO complaint on a November 20, 1990, Review of Congressional Letter concerned a number of alleged errors which were inappropriate (Joint Ex. I, MSPB, Agency Book III, 4 c (4)). The formal complaint was filed January 2, 1991.

Ms. Heiskell, Mullins' confidante, testified Barnett was treated differently (Joint Ex. I, Case 91-1329, B-14, page 3; Heiskell depo, Ex. A to MSPB, #5, page 4). Mullins treatment of Barnett was said to be "stiff and formal" (IBID. page 56, line 7-9). "Barnett was treated more formally and less friendly; the others were more like buddies and pals." (IBID. page 36, lines 4-6).

Mullins testified it was after Barnett filed her first EEO complaint that he determined the relationship between him and Barnett was not good (Joint Ex. I, MSPB, Vol. I, page 165, line 5-9). In the same testimony, Mullins testified that he had a "healthy relationship" with Barnett at that time. (IBID. page 25, line 13-16). The fact that

Mullins related this to an EEO complaint is probative of retaliation.

Mullins denigrated Barnett's interactions with staff members, saying she had problems getting along and was rude (Ct. Vol. VI, page 82, line 12-13, Joint Ex. I, Case 90-821, B-4, page 2, line 33, page 3, line 17; IBID. page 16, line 17-34). Barnett's co-workers described her relationship with them as "... cordial ... professional, ... friendly ... no difficulty working with Barnett" (Joint Exhibit I, MSPB, Vol. II: Combs, page 349-355; Cartledge, page 376; Wilkerson, page 411; MSPB, Vol. I, Hill, page 208-209, 218; IBID, Case No. 91-319: Hunsinger, B-11, page 5, Ans. 29; Combs, B-7, page 7, Ans. 29; Case No. 91-1329, Heiskell, B-14, page 3, 4th ques/ans; Case No. 90-821, Cartledge, B-6, page 1, ques/ans. 6).

Mullins claimed veterans had complained about Barnett. Mullins testified to only one complaint from one unknown veteran. (Joint Ex. I, MSPB, Vol. I, page 156, line 20 — page 157, line 19).

Ms. Zachgo had no valid complaints from veterans about Barnett (Zachgo depo., Joint Ex. I, Ex. A to MSPB, page 25, line 17 — page 26, line 6). Ms. Heiskell reported one veteran complained and then conceded Barnett could have been just doing her job (IBID. Heiskell depo., page 78, line 14 — page 79, line 18).

While the hostility and reprisal began almost immediately, the hostility increased after Barnett filed these EEO complaints. The notice of proposed termination and the removal were sufficiently close in time to be reprisal for these EEO complaints. See: *Johnson v. U.S. Dept. Of Health & Human Services*, 30 F.3d 45-7 (6th Cir., 1994).

D. Other Differences In Treatment Demonstrating Discrimination

Seriously Disabled Veterans: In October 1990, veterans with 50 percent or more disability had preference in

scheduling (Heiskell depo., Joint Ex. I, Ex. A to MSPB, #5, page 5, line 23 — page 6, line 7). The probability of Barnett being assigned seriously disabled veterans was greater than for others because she spent more days in the office.

Co-Workers are an Important Resource: Regulations encourage the discussion of cases with co-workers. Male CPs discussed cases with each other frequently (Joint Ex. I, Ex. A to MSPB, Zachgo depo., page 24, line 15 — page 25, line 12; Page 30, line 22 page 32, line 7; Heiskell depo., page 53, line 6-14). Mullins criticized Barnett, alleging she was not making independent decisions (Joint Ex. I, Case 89~437, B-6, page 6, last part ques/ans. 2; Case 90-821, B-4, page 3, line 5-17; page 42, line 1-16). His allegation was contradicted by testimony from Dr. Combs. (IBID. B-8, page 2, Ans. 7), and Mr. Hunsinger. (IBID. Case 91-1329, B-7, page 2, Ques/Ans. 3 & 4) and by Mullins's own testimony. (IBID, Case 91-1329, page 3, last 8 line of last Ques/Ans).

Advisory Opinions: Male CPs obtained advisory opinions direct from contact with Central Office (Joint Ex. I, MSPB, Vol. II, page 338, line 20 — page 339, line 2; IBID, Case 91-1329, B-6, page 2, first ques/ans). Barnett was denied this privilege.

Interoffice Communication: Barnett was isolated from others by Mullins's criticisms and his increasing abuse. Ms. Heiskell testified information in the office was not communicated formally. Information was passed on informally and because Barnett was not one of the guys, much information needed to perform the work was denied to Barnett (Joint Ex. I, Case 91-1329, B-14, page 3-4).

Acting VR&C Officer: All CPs except Barnett were assigned on a rotating basis to the job of acting VR&C officer. Mr. Hunsinger shared this assignment until 1990 (IBID. page 29, line 10-20; page 10, line 10 — page 11, line 12; IBID, MSPB, Vol. II, page 399, line 5-20).

Ms. Zachgo testified Mullins said he would never make Barnett acting VR&C officer unless the front office demanded she had to be included (IBID, page 22, line 5-13).

E. There Was Confusion, Contradiction, and Discrimination in Applying Performance Standards.

Quality Review System (QRS) and Statistical Quality Control (SQC) and the Performance Appraisal Plan (PAP): The QRS method of evaluating CP and VRS work had been used from the end of 1988. Agency witness, Dr. Lawson, testified this method was intended to be more positive in evaluating work, eliminating some of the negativism of the SQC system which concentrated on errors (Joint Ex. I, MSPB, Vol. I, page 267, line 1-25).

Mullins testified his Central Office training was that findings from QRS should not be applied to determine performance (IBID., Vol. I, page 44, line 3 page 45, line 3). Further, QRS measures the overall quality of services being provided by the division, and the completed QRS sheets are not used in any way, shape or form to determine performance (IBID, Vol. I, page 105, line 20 — page 106, line 3).

Mullins was required to review six cases per case manager per quarter under the QRS system and those cases were to be selected randomly (IBID, page 41, line 15-17). This aspect of reviewing work was uniform as was the annual error limitation under the PAP.

The PAP provides for the identification of errors under "measurement indicators. These include files referred to the reviewing officer through congressional inquiries, re-evaluations, or any case requiring the VR&C officer's signature, such as, out-of-state training, use of high tuition cost schools, tutoring contracts, granting additional entitlement, etc.

The number of cases reviewed for each case manager under measurement indicators was not uniform. Mullins

testified he had no idea how many cases he reviewed for each CP under measurement indicators (Ct. Vol. VII, page 23, line 10 — page 24, line 10; Joint Ex. I, MSPB, Vol. I, page 107, line 12 — page 108, line 17). Both Messrs. Combs and Hunsinger testified QRS cases were the only cases reviewed by Mullins (Joint Ex. I, Case 90-821, B-8, page 2, Ques/Ans. 10-12; Case No. 91-319, B-11, page 3, Ques/Ans. 14).

Both Combs and Hunsinger stated that Barnett was scheduled to see more veterans than they (Joint Ex. I, Case 90-821, B-8, page 8, Ques/Ans. 9 and IBID, B-7, page 2, Ques/Ans. 9 — 10). In 1990, Barnett had 48 more initial counseling clients reporting than Dr. Combs and 63 more than Mr. Hunsinger (Plaintiff's Ct., Ex. F(Rev.) page 29).

Barnett had half as many trainees for her VRS assignment as Mr. Cartledge who was 75 percent VRS and 2-1/2 times as many trainees as Mr. Hunsinger (IBID, page 26). Trainees at the community college to which Barnett was assigned required more tutorial assistance and curriculum guidance than trade schools or four-year colleges. Dr. Combs testified he discussed cases with Mullins which required his approval (Joint Ex. I, MSPB, Vol. II, page 332, line 3-21). Both Messrs. Cartledge and Hunsinger discussed cases with Mullins (IBID, page 382, line 12 — page 383, line 1; Case 91-319, B-11, page 3, Ques/Ans. 13 and page 3-4, Ques/Ans. 19). This type of relationship with Mullins did not exist for Barnett.

The unreasonable demands and expectations herein create an inference of discrimination. Further, the use of unreasonable expectations during the warning period create a circumstance of impossibility of performance. Such actions on the part of the agency are evidence of discrimination. See: *Dale v. Chicago Tribune Company, supra.*

Eligibility Determinations: Mullins testified if the CP changed their eligibility decision to agree with his de-

termination, no error would be counted against them on performance standards (Ct. Vol. VI, page 158, line 9-18; Joint Ex. I, MSPB, Vol. I, page 38, line 5-19; IBID, Case No. 91-1329, B-14, page 5, last Ans, line 13-19). Mullins stated this policy was discussed with each CP when they came to the division (Ct. Vol. VI, page 160, line 8-18 and page 160, line 22 — page 161, line 1) and in staff meetings (Joint Ex. I, MSPB, Vol. I, page 97, line 19 page 98, line 7). (Mullins admitted staff meetings were not held (Ct. Vol. VI, page 89, line 17-18)).

Mullins testified he disagreed with CPs on eligibility determinations "... many times over ..." (Joint Ex. I, MSPB, Vol. I, page 39, line 9-24); if CPs did not know of this policy, none would have met their performance standards and alleged Barnett would not have met her PAP the first three years (Ct. Vol. VI, page 160, line 11-13).

Barnett first heard of this policy after she was terminated (Ct. Vol. I, page 149-150). Her first performance appraisal (1988) was satisfactory; she was training under Mullins and errors in his review of her work did not apply under the PAP (Joint Ex. I, Case 89-437, page 2, 1st Ans). Mullins testified after the first year, if Barnett had an error he would apply the performance standards and count that error at the end of the year (Ct. Vol. IV, page 133, line 10-19).

The failure of the agency to provide Barnett with this information critical to the performance of her job while males were provided the information, plus the failure to apply the rule to Barnett when it was applied to males, demonstrates discrimination. See: *Johnson v. Lehman*, 679 F.2d 918 (1982).

The Unsatisfactory Performance (April 1, 1990 to March 10, 1991): Immediately following Barnett's complaints of disparate treatment and retaliation, Barnett's work was subjected to a critical scrutiny not applied to others.

As late as August 28, 1990, Mullins stated Barnett had six cases (per quarter) reviewed by him, the same as other CPs, but that Barnett was the only one who submitted cases for his review (Joint Ex. I, Case 9O-821, B-4, p. 21, ans. 45). All three male CPs testified they discussed cases with Mullins (Joint Ex. I, MSPB, Vol. II, pg. 281, line 12-l4; IBID, pg. 332, line 1-25; IBID. pg. 396, line 24 — 397, line 2).[6]

Mullins testified he had no idea how many cases he reviewed for each CP (Ct. Vol. VI, page 23-24; Joint Ex. I, MSPB, page 107-108). Both Combs and Hunsinger testified only six randomly selected cases per quarter under QRS were reviewed for their annual performance (Joint Ex. I, Case 90-821, B-8, pg. 2, line 28-41; IBID, Case 91-319, B-11, pg. 3, Ques/Ans. 14).

Barnett submitted cases to Mullins requiring his signature without pre-discussion. Dr. Combs testified he discussed cases requiring Mullins's signature with him, assuring acceptance. (Joint Ex. I, MSPB, Vol. II, pg. 332, line 7-21).

F. The Opportunity Period Did Not Provide an Objective Measure of Plaintiff's Performance

Opportunity Period: The warning notice of unacceptable performance on March 11, 1991, gave Barnett 60 days in which to improve her performance.[7]

Incorrect Error Count: The alleged 29 errors cited for this period in the removal letter is in error as is the citing of 18 of the 45 cases reviewed. Mullins admitted

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[6] The "discussions" between Barnett and Mullins consisted of his reading his notes on his review of her cases to her, interspersed with hostility, belittlement and his raised voice.

[7] It is logical to conclude the 60 days granted to improve performance would not include cases on which work had been performed before the beginning date of the 60-day period.

that Barnett only committed four procedural, six judgmental, and eight substantive errors when DVA made this correction for the MSPB hearing.[8] Central Office instructions under the SQC system indicated only the most serious error in a given case should be noted for exception.[9]

The alleged substantive error on Hutchinson was on VRS work completed March 5, 1990, which was during the 1989-1990 annual review period for which Barnett had received a fully satisfactory performance appraisal (Joint Ex. I, Ex. E to MSPB, pg. 324-325). An alleged substantive error on Malinski and procedural error on Daniels was for CP work completed in December and October, 1990, predating the opportunity period beginning March 11, 1991. (IBID., pg. 136-139; pg. 158-158a) The number of cases for the opportunity period on which Mullins alleged error should have been 15.

Statistically Invalid Performance Standards: Mullins established performance standards for the opportunity period as not more than one substantive, two Judgmental, and four procedural errors. Based on the number of cases reviewed, these permitted error rates of 2, 4, and 9 percents respectively compared with annual PAP error rates set by Central Office of 12.5, 25, and 41.67 percents.

Central Office standards were based on a review of a sample of cases. The assumption underlying sampling is that the sample is representative of the whole. As the size of the sample increases, the number of errors would be expected to increase but the percent in error would remain the same. Percent in error is the only statistically logical

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[8] Joint Exhibit I, DVA Prehearing Submission to MSPB, page 5, line 1-5. Neither court has recognized the incorrect reporting of alleged error count on which Barnett was terminated.

[9] Joint Ex. I, Ex. B to MSPB, M28-3, App. A-1, pg. 314 and Brief of Appellant to Sixth Circuit Court of Appeals, page 33.

method of comparing annual performance standards (based on an annual sample of 24 cases for Combs and Hunsinger) with the opportunity standards (based on a review of every case, a total of 45 cases (Ct. Vol. V, pg. 51, line 3-8)).

Performance standards for the opportunity period total review which would be statistically valid and comparable to those established for annual performance standards based in sampling would be:

	Annual Performance Standards			Opportunity Period	
Error type	Number	Percent	Control Limits[10]	Number	Percent
Substantive	3	12.5	14.45	6	13.33
Judgmental	6	25.0	21.04	9	20.0
Procedural	10	41.67	30.12	13	28.88

Counting only the most serious errors, Barnett met valid performance standards for alleged judgmental and procedural errors. Eliminating the two substantive errors alleged on cases dated outside the opportunity period (Hutchinson and Malinski), along with Central Office directives and DVA's correction previously cited, Barnett made an alleged six substantive, six judgmental, and four procedural errors.

Six substantive errors would fall below the control limits for acceptable annual performance, exceeding the actual percent in error by eight-tenths of one percent. Six judgmental and four procedural errors would fall below the annual actual percent in error as well as the annual control limits.

Pattern and Practice of Alleging Errors: As Barnett's EEO activity increased in April 1990, Mr. Mullins's hostility, harassment, and intimidation increased along with scrutiny of her work and the allegation of er-

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[10] Upper Control Limits are from M20-2, Ch. 5, SQC Chart for Percent in Error, Appendix E (Plaintiff's Ct., Exhibit F (Rev.), page 247, 251, 253).

rors. This behavior by Mullins echoed his treatment of Eric Shrader after he filed an EEO complaint (Ct. Vol. IV, page 52-54; pg. 56, line 15-20). Before his March 1985 annual performance evaluation was due, Mr. Shrader successfully prevailed in competitive federal employment at another agency and left DVA (IBID, page 57, line 5-10). The failure of the agency to follow its rules in these circumstances provides evidence of discrimination. See: *Johnson v. Lehman, IBID.* Further, the creation of impossible criteria creates an inference of discrimination. See: *Dale v. Chicago Tribune Company, IBID.*

G. Central Office Reviews and Termination

Consensus by Central Office: Both Drs. Carson and Lawson testified they had no knowledge of any instance in which Central Office found any CP's decision to be correct. (Defendant's Ex. 57, page 104-108, line 17; Joint Ex. I, MSPB, Vol. I, page 260, line 1-14).

Mullins submitted incomplete case files for review: Dr. Carson testified Central Office receives the actual case file (Defendant's Ex. 57, page 110, line 5-7) containing all the information available, including"any memos that were written at the local office" (IBID, page 15, line 15 — page 16, line 22). (IBID, page 25, line 16-23; page 60, line 10, page 61, line 24; page 65, line 21-22; page 74, line 2-3; and page 84, line 11-13).

Dr. Lawson testified his determinations were made from duplicate copies of the case materials available to Dr. Carson in her decision-making at Central Office in 1990-91. Although Barnett had submitted a letter of explanation in all cases, there was a letter by Barnett in only one of the case files reviewed (Joint Ex. I, MSPB, Vol. I, page 244, line 16-25).

An exchange of memos on Griffin was not in either the evidence file provided Barnett or in materials DVA sub-

mitted to MSPB (Joint Ex. I, Exhibit E to MSPB, page 99-102; IBID. DVA submission to MSPB, Book III, 4 f (7)).

The manipulation of data creates an inference of discrimination.

Termination as Discipline: Termination of Barnett was approved by John W. Hagan, Jr., then Director of the Regional Office, Louisville, Kentucky. He testified Barnett was terminated because four of the cases were sent to Central Office and the termination was in agreement with her supervisor's (Mullins) recommendation (Joint Ex. I, MSPB, Vol. I, page 280, line 14 — page 281, line 8; IBID, page 285, line 15 — page 286, line 17). Mr. Hagan stated Barnett refused to change her opinion and at that point the issue could be resolved only in Washington, that if she had agreed the errors were there and corrected them, there wouldn't have been an issue and she wouldn't have been terminated (IBID, page 286, line 5-17).

Defense witnesses, Dr. Lawson and Ms. Carson denied Central Office review of cases had anything to do with performance appraisals or disciplining employees (IBID, page 259, line 4 and line 22-24; Defendant's Ex. 57, page 110, line 16 — page 111, line 10; page 150, line 9-17).

H. Subjectivity and the Manipulation of Facts and Regulations

Applications of Subjectivity — A few Examples: The Garnett case was referred to Central Office because Barnett denied Chapter 31 benefits, holding that to assume the veteran's loss of teeth 15 years later was due to his SC fractured jaw would be to establish a causal connection between fractured jaw and loss of teeth, a connection which falls within the jurisdiction of the rating board in the Adjudication Department (Ct. Vol. I, page 106, line 10 — page 108; Joint Ex. I, Ex. D. to MSPB, page 136).

For the Neal case, Barnett found the veteran did not have an employment handicap, having overcome the effects of his SC 20% disability by education (at the masters degree level) and experience. (Joint Ex. I, Ex. B to MSPB, page 208 and M28-1, Part II, para. 1.03 f Step 3 (l)(a) 2 (IBID, page 102).

Ms. Carson believed more information should have been obtained about the viability of a real estate salesman, the ownership of a beauty supply business, and the circumstances of the veteran's employment as Director of Human Resources (Carson depo., Defendant's Ex. 57, page 24, line 2-6, page 116, line 14-19). Despite Carson's criticism of inadequate information, she made a determination the veteran had been denied Chapter 31 benefits.

Veteran Neal was said to be seeking training in the area of computer skills per Carson (IBID, page 141, line 4-7). This was incorrect (Joint Ex. I, Ex. E to MSPB, page 73-77). Mullins testified Neal had no other interests other than working in hospital administration and that the veteran paid his own expenses for his degrees (Ct. Vol. VI, page 4, line 24 — page 5, line 12 and page 6, line 17-25). These were incorrect statements. (Joint Ex. I, Exhibit E to MSPB, page 78-79 and page 89).

Veteran Shook's case was sent to Central Office without the knowledge of, or consultation with, Barnett in violation of M28-1, Part I, para. 3.05 b(2) and para. 3.06 b (Joint Ex. I, Ex. B to MSPB, page 49-50).

The Griffin file was sent to Central Office although the decision on eligibility determination was correct (Joint Ex. I, Ex. E to MSPB, page 105, Part I). The Huntley file was not sent to Central Office as the eligibility determination was correct (Joint Ex. I, Case 91-1329, B-6, page 4, long ans.). Dr. Combs testified he placed the veteran in training and did not change the eligibility determination (Joint Ex. I, MSPB, Vol. II, page 336, line 13 — page 337, line 3).

Defense witness, Carson, stated the denial of additional training on Griffin was a clear and unmistakable error (Defendant s Ex. 57, page 43, line 14-19). The manual M28-1, Part II, para. 103f (l)(a) 2 provides a decision for employment services can later be changed if additional training is needed (Joint Ex. I, Exhibit B to MSPB, page 103, line 4-7). The written response from Central Office stated " The ... determination that Mr. Griffin needs employment services rather than training is hereby reversed (38 CFR 21.414)" (Joint Ex. I, DVA submission to MSPB, Book III, 4 f (7)).

Veteran Woods was rated 10 percent SC for grand mal epilepsy with no neuropathology found. He had had no seizure since 1978 and took medication for control. He was currently employed at the WG13, Step 5 level, earning $15.96 per hour, and had been an electronics inspector since December 1985 (Joint Ex. I, Ex. E to MSPB, page 310-319).

Barnett found the veteran to have overcome his impairment of employability under M28-1, Part II, Chapter 1, para. 1.03(e) which states if the veteran has overcome the effects of the impairment he does not have an employment handicap (Joint Ex. I, Ex. B to MSPB, page 103). Barnett gave the veteran 60 days to submit evidence his disability interfered with his job performance and advised him if his situation changed, he should re-apply for Chapter 31.

Barnett stated in writing to Mullins that she would have no difficulty changing this entitlement determination to agree with Mullins's determination (Joint Ex. I, DVA submission to MSPB, Book III, 4 f (16), contrary to the unwritten policy, Mullins charged her with substantive and judgmental errors.

The Malinski case came to Mullins's attention because the veteran wrote his Congressman, a regular occurrence

per Mullins's testimony (Ct. Vol. VI, page 22, line 1-3). Barnett admitted in writing the "clear and unmistakable error" (Joint Ex. I, DVA submission to MSPB, Book III, 4f(8), Memoranda April 12 and April 10, 1991). Because Barnett agreed she erred, the case should not have been sent to Central Office for resolution. Barnett should have been given the opportunity to revise her decision before the case was given to another CP.

Both the Woods and Malinski cases are examples of cases which should not have been considered errors according to Mullins's "unwritten, local policy" on eligibility determinations, that when there is disagreement between a CP and himself on an eligibility determination, there is no error charged if the CP changes his/her decision to agree with his. (Barnett was not given the opportunity to change the decisions). Both demonstrate that by Mullins' testimony, he treated Barnett differently than he did the male counseling psychologists who had not filed discrimination complaints.

REASONS FOR GRANTING THE WRIT

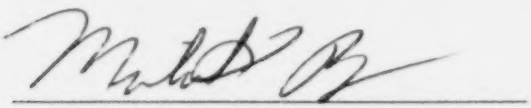
The Writ herein should be granted because the Court of Appeals below has misapplied the case *St. Mary's Home Center* (*IBID*) in that it has misconstrued the burden of proof on plaintiff in a discrimination case. The *St. Mary's Home Center* (*IBID*) did not change the law but, merely clarified the burden of proof. The prima facie case may standing alone or in conjunction with other evidence, create the proof of discrimination in a discrimination case.

Further, in cases of reprisal, where the Trial Court bases its ruling on the nexus in time between the EEO complaint and the job action, it is easy for the Trial Court not to consider the intervening acts of the employer in determining whether a nexus of time exists.

CONCLUSION

The decision of the Trial Court is clearly erroneous. Barnett demonstrated that there was bias and discrimination against her at the time she entered the Department. This fact was clearly demonstrated in the comments to Shrader by Mullins that he wouldn't hire the old bitch on a bet. It was further demonstrated by the statement of Ira Combs that he had negative feelings toward Barnett at the time she entered the department. The difference in treatment of Barnett began almost immediately as was demonstrated when she was refused the opportunity to serve acting VR&C Officer and continued throughout her employment as demonstrated by the testimony at the trial and the administrative hearings, and as demonstrated throughout this brief.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari was mailed this 25 day of November, 1998, to Regina Edwards, Assistant U. S. Attorney, 10th Floor, Bank of Louisville Building, 510 West Broadway, Louisville, Kentucky 40202 and Mr. Alexander L. Stevas, Clerk, Supreme Court of the United States, Washington, D.C. 20543.

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